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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
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Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended.	)	CC Docket No. 96-149

FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 23, 1996 **Released: December 24, 1996**

Comment Date: February 19, 1997
Reply Comment Date: March 21, 1997

By the Commission:

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I. INTRODUCTION

1. In February 1996, the Telecommunications Act of 1996 became law.[1] The intent of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[2]

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), to be codified at 47 U.S.C. §§ 151 et seq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it will be codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

[2] See Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

2. In this proceeding, we adopt non-accounting safeguards, pursuant to section 272 of the Communications Act, to govern entry by the Bell Operating Companies (BOCs) into certain new markets.[3] This proceeding is one of a series of interrelated rulemakings that collectively will implement the telephony provisions of the 1996 Act. Other proceedings under the 1996 Act have focused on opening markets to entry by new competitors,[4] establishing rules to preserve and advance universal service,[5] establishing rules for competition in those markets that are opened to competitive entry,[6] and on lifting legal and regulatory barriers to competition.[7]

3. Upon enactment, the 1996 Act permitted the BOCs immediately to provide interLATA[8] services[9] that originate outside of their in-region states.[10] The 1996 Act conditions

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[3] We define the term "BOC" as that term is defined in 47 U.S.C. § 153(4).

[4] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) (First Interconnection Order), Motion for stay of the FCC's Rules Pending Judicial Review denied, FCC 96-378 (rel. Sep. 17, 1996), partial stay granted, Iowa Util. Bd. v. Federal Communications Commission, No. 96-3321, WL 589204 (8th Cir. Oct. 15, 1996) (Iowa Utilities Board v. FCC), Order Lifting Stay in Part, (8th Cir. Nov. 1, 1996); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Second Report and Order, and Memorandum Opinion and Order, FCC 96-333 (rel. Aug. 8, 1996) (Second Interconnection Order); appeal docketed Bell Atlantic Telephone Companies v. FCC, No. 90-567 (D.C. Cir. Sept. 16, 1996), People of the State of California v FCC, No. 96-3519 (8th Cir. Sept.23, 1996), SBC Communications Inc. v. FCC, No. 96-1414 (D.C. Cir. Nov. 1, 1996).

[5] See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, FCC 96J-3 (rel. Nov. 8, 1996) (Universal Joint Board Recommended Decision); Order Establishing Joint Board on Universal Service, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 96-93 (rel. Mar. 8, 1996).

[6] See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, FCC 96-319 (rel. Aug. 13, 1996).

[7] See Common Carrier Bureau Seeks Suggestions on Forbearance, DA 96-798, Public Notice (rel. May 17, 1996); Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, CC Docket No. 96-61, Second Report and Order, FCC 96-424 (rel. Oct. 31, 1996) (Second Interexchange Order).

[8] Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." 47 U.S.C. § 153(25). LATAs were created as part of the Modification of Final Judgment's (MFJ) "plan of reorganization" under which the BOCs were divested from AT&T. United States v. Western Elec. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); United States v. Western Elec. Co., 569 F. Supp. 1057 (D.D.C. 1983) (Plan of Reorganization), aff'd sub nom. California v. United States, 464 U.S. 1013 (1983); see also United States v. Western Elec. Co., No. 82-0192 (D.D.C. Apr. 11, 1996) (vacating the MFJ). Pursuant to the MFJ, "all BOC territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest."

the BOCs' entry into in-region interLATA services on their compliance with certain provisions of section 271. Under section 271, we must determine, among other things, whether the BOC has complied with the safeguards imposed by section 272 and the rules adopted herein.[11] Section 272 addresses the BOCs' provision of interLATA telecommunications services originating in states in which they provide local exchange and exchange access services, interLATA information services,[12] and BOC manufacturing activities.[13]

United States v. Western Elec. Co., 569 F. Supp. 990, 993 (D.D.C. 1983).

9 The 1996 Act defines "interLATA services" as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21).

10 For purposes of this proceeding, we have defined the term "in-region state" as that term is defined in 47 U.S.C. § 271(i)(1). We note that section 271(j) provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such services originate out-of-region. Id. § 271(j); see also Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21, Report and Order, FCC 96-288 (rel. July 1, 1996) (Interim BOC Out-of-Region Order) (addressing BOC provision of out-of-region, domestic, interstate, interexchange services).

11 47 U.S.C. § 271(d)(3)(B). The Commission also must find, within 90 days, that the interconnection agreements or statements approved by the appropriate state commission under section 252 satisfy the competitive checklist contained in section 271(c)(2)(B), and that the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience and necessity." Id. §§ 271(d)(3)(A), (d)(3)(C). In acting on a BOC's application for authority to provide in-region interLATA services, the Commission must consult with the Attorney General and give substantial weight to the Attorney General's evaluation of the BOC's application. In addition, the Commission must consult with the applicable state commission to verify that the BOC complies with the requirements of section 271(c). Id. § 271(d)(2)(B).

12 The 1996 Act excludes electronic publishing (as defined in section 274(h)) and alarm monitoring (as defined in section 275(e)) from the separate affiliate requirement for interLATA information services. 47 U.S.C. § 272(a)(2)(C).

13 The MFJ prohibited the BOCs from providing information services, providing interLATA services, manufacturing and selling telecommunications equipment, and manufacturing customer premises equipment (CPE). The information services restriction was modified in 1987 to allow BOCs to provide voice messaging services and to transmit information services generated by others. United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987); United States v. Western Elec. Co., 714 F. Supp. 1 (D.D.C. 1988). In 1991, the restriction on BOC ownership of content-based information services was lifted. United States v. Western Elec. Co., 767 F. Supp. 308 (D.D.C. 1991), stay vacated, United States v. Western Elec. Co., 1991-1 Trade Cases (CCH) ¶ 69,610 (D.C. Cir. 1991). The 1996 Act defines the term "AT&T Consent Decree" to refer to the MFJ and all subsequent judgments or orders related to the MFJ. 47 U.S.C. § 153(3). In the text of this order, we use the term "MFJ" and "MFJ Court" only to refer to the AT&T Consent Decree as defined in the 1996 Act and by the decisions of the D.C. District Court. We will cite with particularity to the terms of the original Modification of Final Judgment cited at United States v. Western Elec. Co. 552 F. Supp. at 226-232.

4. On July 18, 1996, we initiated this proceeding by releasing a Notice of Proposed Rulemaking (Notice)[14] that sought comment on the non-accounting separate affiliate and nondiscrimination safeguards of the 1996 Act. These provisions govern the BOCs' entry into certain new markets. We initiated a separate proceeding to address the accounting safeguards required to implement sections 260 and 272 through 276 of the Communications Act.[15] Comments on the non-accounting separate affiliate and nondiscrimination safeguards were filed on August 15, 1996, and reply comments were filed on August 30, 1996.[16]

5. The Notice also sought comment on whether we should relax the dominant carrier classification that under our current rules would apply to in-region, interstate, domestic, interLATA services provided by the BOCs' interLATA affiliates. Further, the Notice sought comment on whether we should modify our existing rules for regulating the provision of in-region, interstate, interexchange services by independent local exchange carriers (LECs) (namely, carriers not affiliated with a BOC). Finally, the Notice considered whether to apply the same regulatory treatment to the BOC affiliates' and independent LECs' provision of in-region, international services, as would apply to the provision of in-region, interstate, domestic, interLATA services and in-region, interstate, domestic interexchange services, respectively. This order addresses only the non-accounting separate affiliate and nondiscrimination safeguards in sections 271 and 272. The classification of BOC affiliates or independent LECs (and their affiliates) as dominant or non-dominant will be addressed in a separate Report and Order in this docket.

6. In this order, we promulgate rules and policies implementing, and, where necessary, clarifying the non-accounting separate affiliate and nondiscrimination safeguards prescribed by Congress in sections 271 and 272. These safeguards are intended both to protect subscribers to BOC monopoly services, such as local telephony, against the potential risk of having to pay costs incurred by the BOCs to enter competitive markets, such as interLATA services and equipment manufacturing, and to protect competition in those markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage in those new markets the BOCs seek to enter. Our action today continues the process of enhancing competition in all telecommunications markets as envisioned by the 1996 Act.

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[14] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provisions of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (rel. July 18, 1996).

[15] See Accounting Safeguards for Common Carriers Under the Telecommunications Act of 1996, CC Docket No. 96-150, Notice of Proposed Rulemaking, 11 FCC Rcd 9054 (1996) (Accounting Safeguards NPRM).

[16] Appendix A lists the parties that filed comments and replies.

A. Background

7. The fundamental objective of the 1996 Act is to bring to consumers of telecommunications services in all markets the full benefits of vigorous competition. As we recognized in the First Interconnection Order, "[t]he opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices, and increased innovation to American consumers."[17] With the removal of legal, economic, and regulatory impediments to entry, providers of various telecommunications services will be able to enter each other's markets and provide various services in competition with one another. Both the BOCs and other firms, most notably existing interexchange carriers, will be able to offer a widely recognized brand name that is associated with telecommunications services. As firms expand the scope of their existing operations to new product lines, they will increasingly offer consumers the ability to purchase local, intraLATA, and interLATA telecommunications services, as well as wireless, information, and other services, from a single provider (i.e., "one stop shopping"), and other advantages of vertical integration.[18]

8. The 1996 Act opens local markets to competing providers by imposing new interconnection and unbundling obligations on existing providers of local exchange service, including the BOCs. The 1996 Act also allows the BOCs to provide interLATA services in the states where they currently provide local exchange and exchange access services once they satisfy the requirements of section 271. Moreover, by requiring compliance with the competitive checklist set out in section 271(c)(2)(B) as a prerequisite to BOC provision of in-region interLATA service, the statute links the effective opening of competition in the local market with the timing of BOC entry into the long distance market, so as to ensure that neither the BOCs nor the existing interexchange carriers could enjoy an advantage from being the first to enter the other's market.

9. In enacting section 272, Congress recognized that the local exchange market will not be fully competitive immediately upon its opening. Congress, therefore, imposed in section 272 a series of separate affiliate requirements applicable to the BOCs' provision of certain new services and their engagement in certain new activities. These requirements are designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting, while still giving consumers the benefit of competition.

10. As we observed in the Notice, BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section

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[17] First Interconnection Order at ¶ 4.

[18] There are economies of scope where it is less costly for a single firm to produce a bundle of goods or services together, than it is for two or more firms, each specializing in distinct product lines, to produce them separately. See, e.g., John C. Panzar and Robert D. Willig, Economies of Scope, 71 Am. Econ. Rev. of Papers and Proc. 268 (1981); William J. Baumol, John C. Panzar, and Robert D. Willig, Contestable Markets and the Theory of Industry Structure 71-79 (1982); Daniel F. Spulber, Regulation and Markets 114-15 (1989).

271(d)(3). BOCs currently are the dominant providers of local exchange and exchange access services in their in-region states, accounting for approximately 99.1 percent of the local service revenues in those markets.[19] If a BOC is regulated under rate-of-return regulation, a price caps structure with sharing (either for interstate or intrastate services), a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if any revenues it is allowed to recover are based on costs recorded in regulated books of account, it may have an incentive to allocate improperly to its regulated core business costs that would be properly attributable to its competitive ventures.

11. In addition, a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive. With respect to BOC manufacturing activities, a BOC may have an incentive to purchase only equipment manufactured by its section 272 affiliate, even if such equipment is more expensive or of lower quality than that available from other manufacturers.[20]

12. Moreover, if a BOC charges other firms prices for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate, then the BOC could create a "price squeeze."[21] In that circumstance, the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions. This artificial advantage may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer. Unlawful discriminatory preferences in the quality of the service or preferential

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[19] Industry Analysis Division, Telecommunications Industry Revenue: TRS Worksheet Data (Com. Car. Bur. Feb. 1996). Tables 18 and 15 show that BOC local and access revenues in 1994 were $61.4 billion, while Competitive Access Provider (CAP) local and access revenues both in and out of BOC regions were only $281 million. We acknowledge that the CAP rate of growth is high, but their share of the overall end market is small and is the key factor.

[20] Whenever a competing manufacturer sells its product at a price that exceeds the marginal cost of producing it, the possibility exists that a BOC would have an incentive to favor its affiliate's product over the competitor's, even when it is inefficient to do so. In general, the greater the difference between the competitor's price and cost, the greater the incentive for the BOC to favor its affiliate.

[21] See, e.g., P.L. Joskow, Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition, in Antitrust and Regulation: Essays in Memory of John J. McGowan 173-239 (F.M. Fisher ed., 1985); S.C. Salop and D.T. Scheffman, Raising Rivals' Costs, 73 Am. Econ. Rev. Papers & Proc. 267 (1983); T.G. Krattenmaker and S.C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L.J. 209 (1986).

dissemination of information provided by BOCs to their section 272 affiliates, as a practical matter, can have the same effect as charging unlawfully discriminatory prices. If a BOC charged the same rate to its affiliate for a higher quality access service than the BOC charged to unaffiliated entities for a lower quality service, or disclosed information concerning future changes in network architecture to its manufacturing affiliate before disclosing it to others, the BOC could effectively create the same "price squeeze" discussed above.

13. The structural and nondiscrimination safeguards contained in section 272 ensure that competitors of the BOC's section 272 affiliate have access to essential inputs, namely, the provision of local exchange and exchange access services, on terms that do not discriminate against the competitors and in favor of the BOC's affiliate. Because the BOC has the incentive to provide its affiliate with the most efficient access, the statute requires the BOC to provide competitors the same access. Access to such inputs on nondiscriminatory terms will enable a new entrant to compete effectively, assuming it is at least as efficient as the BOC and/or its section 272 affiliate. At the same time, Congress also was sensitive to the value to the BOCs of potential efficiencies stemming from economies of scale. Our task is to implement section 272 in a manner that ensures that the fundamental goal of the 1996 Act is attained -- to open all telecommunications markets to robust competition -- but at the same time does not impose requirements on the BOCs that will unfairly handicap them in their ability to compete. The rules and policies adopted in this order seek to preserve the carefully crafted statutory balance to the extent possible until facilities-based alternatives to the local exchange and exchange access services of the BOCs make those safeguards no longer necessary.[22]

B. Overview and Summary

14. Section 272 allows a BOC to engage in the manufacturing of telecommunications equipment and CPE, the origination of certain interLATA telecommunications services,[23] and the provision of interLATA information services,[24] as long as the BOC provides these activities through a separate affiliate. Unless extended by the Commission, the statutory separate affiliate requirements for manufacturing and interLATA telecommunications services expire three years after a BOC or any BOC affiliate is authorized to provide in-region interLATA services.[25] The

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[22] Access Charge Reform, CC Docket No. 96-262, Notice of Proposed Rulemaking, FCC 96-488 (rel. Dec. 24, 1996) (Access Charge Reform NPRM).

[23] Specifically, the separate affiliate requirement applies to the origination of interLATA telecommunications services, other than specified incidental interLATA services, out-of-region services, and previously authorized activities. 47 U.S.C. § 272(a)(2)(B).

[24] Id. § 272(a)(2)(C).

[25] Id. § 272(f)(1).

statutory interLATA information services separate affiliate requirement expires on February 8, 2000, four years after enactment of the 1996 Act, unless extended by the Commission.[26]

15. This order implements the structural separation requirements mandated by section 272 in a manner that is designed to prevent improper cost allocation between the BOC and its section 272 affiliate and discrimination by the BOC in favor of its section 272 affiliate. In particular, we construe the section 272(b)(1) "operate independently" requirement to prohibit the BOC and its section 272 affiliate from jointly owning transmission and switching facilities or the land and buildings on which such facilities are located. Moreover, we prohibit a BOC and its affiliates, other than the section 272 affiliate itself, from providing operating, installation, and maintenance services associated with the facilities owned by the section 272 affiliate. Similarly, a section 272 affiliate may not provide such services associated with the BOC's facilities. These requirements should reduce the potential for the improper allocation of costs to the BOC that should be allocated to the section 272 affiliate. In addition, they should ensure that a section 272 affiliate must follow the same procedures as its competitors in order to gain access to a BOC's facilities. Consistent with these requirements and those established pursuant to sections 272(b)(5) and 272(c)(1), however, a section 272 affiliate may negotiate with an affiliated BOC on an arm's length basis to obtain transmission and switching facilities, to arrange for collocation of facilities, and to provide or obtain services other than those expressly prohibited herein.

16. The structural separation requirements of section 272, in conjunction with the affirmative nondiscrimination obligations imposed by that section, also are intended to address concerns that the BOCs could potentially use local exchange and exchange access facilities to discriminate against competitors in order to gain an anticompetitive advantage for their affiliates that engage in competitive activities. We interpret section 272(c)(1) as imposing a flat prohibition against discrimination more stringent than the bar on "unjust and unreasonable" discrimination contained in section 202 of the Act. In short, the BOCs must treat all other entities in the same manner in which they treat their section 272 affiliates. We conclude that a BOC may not discriminate in favor of its section 272 affiliate by: 1) providing exchange access services to competing interLATA service providers at a higher rate than the rate offered to its section 272 affiliate; 2) providing a lower quality service to competing interLATA service providers than the service it provides to its section 272 affiliate at a given price; 3) giving preference to its affiliate's equipment in the procurement process; or 4) failing to provide advance information about network changes to its competitors. We seek comment in a Further Notice of Proposed Rulemaking on specific disclosure requirements to implement section 272(e)(1).

17. In this order, we also seek to ensure that BOC section 272 affiliates have the same opportunity to compete for customers as other long distance service providers. The joint marketing rules we have established limit the ability of the largest interexchange carriers to market jointly their interLATA service with resold BOC local exchange service, until the BOC receives in-region, interLATA authority under section 271 or until 36 months after enactment of

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[26] Id. § 272(f)(2).

the 1996 Act. Once the BOC receives interLATA authority, the restrictions on interexchange carrier joint marketing expire, and the interexchange carriers and the BOCs and their section 272 affiliates may engage in the same types of marketing activities.

18. In addition, we clarify that the Communications Act allows a section 272 affiliate to purchase unbundled elements pursuant to section 251(c)(3)[27] and telecommunications services at wholesale rates under section 251(c)(4).[28] Thus, the section 272 affiliate may provide integrated services in the same manner as other competitors. Such an approach is consistent with the objectives of the 1996 Act, which are to give service providers the freedom to develop a wide array of service packages and allow consumers to select what best suits their needs. We note, however, that the BOC may not transfer local exchange and exchange access facilities and capabilities to the section 272 affiliate, or another affiliate, in order to evade regulatory requirements.

19. We recognize that no regulatory scheme can completely prevent or deter discrimination, particularly in its more subtle forms. In this order, we shift the burden of production to the BOCs in the context of section 271(d)(6) enforcement proceedings in order to alleviate the burden on the complainant and facilitate the detection of anticompetitive behavior. Because the BOC is likely to be in sole possession of most of the relevant information necessary to establish the complainant's case, shifting the burden is the most efficient way of resolving complaints alleging violations of the conditions of in-region interLATA entry under section 271(d)(3). The goal of this proceeding and others is to establish a regulatory framework that enables service providers to enter each other's markets and compete on an equal footing by not allowing one service provider to game regulatory requirements in such a way as to hinder competition.

II. SCOPE OF COMMISSION AUTHORITY

A. Rulemaking Authority

1. Background

20. In the Notice, we addressed the scope of the Commission's authority, pursuant to sections 271 and 272, over interLATA services, interLATA information services and

[27] 47 U.S.C. § 251(c)(3).

[28] 47 U.S.C. § 251(c)(4).

manufacturing activities.[29] Although we did not seek comment on whether the Commission has authority to adopt rules implementing section 272, several commenters addressed this issue.

2. Comments

21. Certain BOCs and USTA maintain that the Commission lacks authority to adopt rules implementing the non-accounting safeguards contained in section 272.[30] They further maintain that, even if the Commission has such authority, it should not adopt any rules because they are not necessary. These and other parties argue that section 272 contains detailed separate affiliate requirements and therefore is self-executing and needs little or no interpretation.[31] They further suggest that all of the Commission's proposed regulations are impermissible because they go beyond the basic terms of section 272.[32] Bell Atlantic and USTA assert that Congress clearly intended for section 272 to be a self-executing provision because a Senate bill provision specifying that the Commission implement regulations under section 272 was removed from the legislation in conference.[33]

22. In response, other parties argue that the Commission has the authority to, and should, promulgate rules implementing section 272. AT&T, TIA, and Time Warner maintain that the Commission has authority, pursuant to other provisions of the Act, including sections 4(i), 201(b), and 303(r), to adopt rules implementing section 272, even though section 272 does not

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[29] Notice at ¶¶ 19-30. In the Notice, in addressing the scope of sections 271 and 272, we referred to "interLATA services" and "interLATA information services" separately (but in the same analysis). In part III.A.1 of this Order, we determine that "interLATA services" includes "interLATA information services." Accordingly, in the discussion in this section regarding the scope of sections 271 and 272, we refer only to interLATA services, but intend that the use of that term include interLATA information services.

[30] Bell Atlantic at 2-3 (with regard to intrastate services); BellSouth at 3-6; SBC at 2-5 (Commission has authority to implement and enforce section 272, but may not expand those requirements); USTA at 2-3, 7-8; USTA Reply at 3.

[31] USTA at 3-4, 7-8; Bell Atlantic at 2-3; BellSouth at 3-6. BellSouth also argues that Congress did not grant the Commission authority to adopt "legislative" rules other than accounting rules, and therefore any rules the Commission adopts would constitute "interpretive" rules not entitled to judicial deference. BellSouth at 3 (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984)); see also SBC at 2-5; U S West Reply at 4 (stating that, "although the Commission certainly retains its general rulemaking authority, it should tread lightly here"); PacTel at 3-4 (stating that there are ambiguities in section 272 for which the "Commission's guidance would be helpful," but stating that "[b]eyond those difficulties, the only specific areas where Congress envisioned further rulemaking by the FCC were accounting and record keeping").

[32] Bell Atlantic at 2-3; BellSouth at 4-6; USTA at 8; SBC at 2-5 (stating that the Commission has authority to implement and enforce section 272, but may not expand those requirements).

[33] Bell Atlantic at 3; USTA at 3.

specifically direct the Commission to adopt rules.[34] AT&T and Time Warner state that the Commission has the authority to adopt implementing rules when Congress enacts broad principles that require interpretation,[35] and that section 272 contains ambiguities that require explanation in order to effectuate the 1996 Act's purposes.[36] Time Warner argues that the courts have consistently held that the Commission has expansive rather than limited powers to conduct general rulemakings, so long as those rulemakings are based on permissible public interest goals and are a reasonable means to achieve those goals.[37] Finally, in response to the claim that the removal of specific 272 rulemaking authority indicates that Congress intended for section 272 to be self-executing, AT&T argues that Congress could have precluded the Commission from adopting rules, but did not.[38]

3. Discussion

23. We reject as unfounded the assertion that the Commission lacks authority to adopt regulations implementing section 272. Sections 4(i), 201(b), and 303(r) of the Act authorize the Commission to adopt any rules it deems necessary or appropriate in order to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act.[39] Nothing in section 272 bars the Commission from exercising the rulemaking authority granted by these sections of the Act to clarify and implement the requirements of section 272. Moreover, courts repeatedly have held that the Commission's general rulemaking authority is "expansive" rather than limited.[40] In addition, as AT&T notes, it is well-established that an agency has the

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34 AT&T Reply at 6-7 & n.14; TIA Reply at 6-7; Time Warner Reply at 4-6; see also LDDS Reply at 2-4; MCI Reply at 2 n.6.

35 AT&T Reply at 6 (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974), and Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)); Time Warner Reply at 6.

36 AT&T Reply at 8-14; LDDS Reply at 3-4; MCI Reply at 2; see also PacTel at 3 (stating that "it would serve the interests of justice for the Commission to indicate in advance -- whether by rule or otherwise -- how it interprets any ambiguous requirements in § 272 so that the BOCs may be advised of what is necessary to comply"); Sprint Reply at 2-3.

37 Time Warner Reply at 5-6 (citing Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943) and Fed. Communications Comm'n v. Nat'l Citizens Comm.for Broadcasting, 436 U.S. 775, 776, 793 (1978)); see also Sprint Reply at 2-3 (stating that "[t]he ability of the Commission to use general rulemaking procedures to provide further guidance to the states and interested parties and to thereby explicate the policies and interpretations it intends to adopt in its administration of the statute entrusted to its jurisdiction so as to carry out the intent of Congress is at the heart of the regulatory process").

38 AT&T Reply at 6.

39 See United States v. Storer Broadcasting Co., 351 U.S. 192, 202-03 (1956).

40 Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943); see also Fed. Communications Comm'n v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775, 793 (1978).

authority to adopt rules to administer congressionally mandated requirements.[41] Contrary to those parties that argue that section 272 is self-executing, we find that Congress enacted in section 272 broad principles that require interpretation and implementation in order to ensure an efficient, orderly, and uniform regime governing BOC entry into in-region interLATA telecommunications and other markets covered by section 272. In the Notice, we identified areas of ambiguity in the requirements of section 272 with the specific goal of clarifying and implementing Congress's intent in that provision. That remains our goal in this Order. Due to the importance of the introduction of competition to the local exchange market, we believe this Order to be both important and necessary to protect BOC customers and new entrants. Further, we agree with PacTel that it serves the interests of justice for us to clarify in advance the section 272 requirements so that BOCs and other parties may be advised of what is required to meet the condition for 271 authorization that in-region interLATA services be provided in compliance with section 272.[42]

24. We are not persuaded by the argument that the removal of the Senate bill's provision regarding implementing regulations from the 1996 Act indicates Congress's intent that section 272 be self-executing. Parties advancing this argument rely on a rule of statutory construction providing that, when a provision in a prior draft is altered in the final legislation, Congress intended a change from the prior version. The courts have rejected this rule of statutory construction, however, when changes from one draft to another are not explained.[43] In this instance, the only statement from Congress regarding the meaning of the omission of the Senate provision appears in the Joint Explanatory Statement. According to that Statement, all differences between the Senate Bill, the House Amendment, and the substitute reached in conference are noted therein "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes."[44] Because the Joint Explanatory Statement did not address the removal of the Senate bill provision, the logical inference is that Congress regarded the change as an inconsequential modification, rather than a significant alteration. Moreover, it seems implausible that, in enacting the final version of section 272, Congress intended a radical alteration of the Commission's general rulemaking authority.

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[41] See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Morton v. Ruiz, 415 U.S. 199, 231 (1974) (holding that "[t]he power of an administrative agency to administer a congressionally created. . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress").

[42] See PacTel at 3.

[43] Mead Corp v. Tilley, 490 U.S. 714, 723 (1989); Rastelli v. Warden, 782 F.2d 17, 23 (2d Cir. 1986); Drummond Coal v. Watt, 735 F.2d 469, 474 (11th Cir. 1984).

[44] Joint Explanatory Statement at 113.

We therefore conclude that elimination of the proposed provision was a nonsubstantive change.[45] Based on the foregoing, we find, pursuant to the general rulemaking authority vested in the Commission by sections 4(i), 201(b), and 303(r) of the Act, and consistent with fundamental principles of administrative law, that the Commission has the requisite authority to promulgate rules implementing section 272 of the Act.

B. Scope of Commission's Authority Regarding InterLATA Services

a. Background

25. In the Notice, we tentatively concluded that the Commission's authority under sections 271 and 272 applies to intrastate and interstate interLATA services provided by BOCs or their affiliates.[46] We based this tentative conclusion in part on our analysis that Congress intended sections 271 and 272 to replace the pre-Act restrictions on the BOCs contained in the MFJ, which barred their provision of both intrastate and interstate interLATA services.[47] We also observed that the interLATA/intraLATA distinction appears to some extent to have supplanted the traditional interstate/intrastate distinction for purposes of sections 271 and 272.[48] We further noted that reading sections 271 and 272 as applying to all interLATA services fits well with the structure of the statute as a whole,[49] and that reading the sections as limited to interstate services would lead to implausible results.[50] We also indicated that we do not believe that section 2(b) of the Act precludes the conclusion that our authority under sections 271 and 272 applies to intrastate as well as interstate interLATA services.[51] Finally, we asked parties that disagreed with the foregoing analysis to comment on the extent to which the Commission may have authority to preempt state regulation with respect to some or all of the non-accounting matters addressed by sections 271 and 272.[52]

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[45] In addition, even if the removal were considered as more than inconsequential, we believe that the most plausible explanation is that Congress found such a specification unnecessary in light of sections 4(i), 201(b), 303(r), and long-standing principles of administrative law.

[46] Notice at ¶ 25.

[47] Id. at ¶ 21.

[48] Id. at ¶ 22.

[49] Id. at ¶ 23.

[50] Id. at ¶ 25.

[51] Id. at ¶ 26.

[52] Id. at ¶ 28.

b. **Comments**

26. Many parties, including BellSouth, PacTel, USTA and the New York Commission, agree that sections 271 and 272 cover both intrastate and interstate services.[53] DOJ, BellSouth, and AT&T maintain that the Act, by its terms, explicitly covers intrastate interLATA services and thus, grants the Commission authority over intrastate interLATA services for purposes of sections 271 and 272.[54] DOJ and AT&T argue that, because the grant is explicit, section 2(b) does not bar the Commission from adopting rules that apply to the provision of intrastate interLATA services.[55] These and other parties generally argue, as a separate basis for finding that sections 271 and 272 extend to both intrastate and interstate interLATA services, that Congress intended for the Act to replace the MFJ.[56] These parties contend that, since the MFJ restrictions applied to the BOCs' provision of both intrastate and interstate interLATA services, Congress intended for sections 271 and 272 to apply to the BOCs' provision of both types of services as well.[57] Indeed, several of these parties maintain that interpreting sections 271 and 272 as covering both intrastate and interstate interLATA services is the only reasonable interpretation.[58] Several parties further maintain that section 2(b) of the Act does not affect this analysis.[59]

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[53] DOJ Reply at 4-7; New York Commission at 2-3 (but arguing that the Commission lacks authority to establish rules applicable to intrastate interLATA services); BellSouth at 15; PacTel at 3 (maintaining, however, that "Congress did not give the FCC plenary authority over those services to implement any and all regulations and safeguards whatsoever."); USTA at 7 (but arguing that section 272 is self-executing); AT&T at 8; AT&T Reply at 3-4; Sprint at 9-10; Sprint Reply at 4; MCI at 3; MCI Reply at 3-4; Excel at 11; CompTel at 3-6; TRA at 5-6; ITAA at 5-7.

[54] DOJ Reply at 4-5 (arguing that the Act's definitions of the terms "LATA," and "interLATA" include intrastate services); AT&T at 8 (arguing that the Act's definition of the term "interLATA" applies to both intrastate and interstate services so long as they cross a LATA boundary); BellSouth at 15-16 (stating that "[t]he explicit grants of FCC jurisdiction in Sections 271 and 272 override the generic restrictions on FCC jurisdiction in Section 2(b)," but arguing that "these exemptions must be narrowly construed in order to preserve the meaning of 2(b)"); see also CompTel at 4, 5 (stating that "[p]ursuant to the MFJ, LATAs were defined based 'upon a city or other identifiable community or interest,' without limitation by state boundaries. Because a single state may contain more than one LATA, interLATA communications may be intrastate as well as interstate in nature." (footnote omitted)).

[55] DOJ Reply at 6-7; AT&T at 8-9.

[56] New York Commission at 2-4 (maintaining, however, that the Commission lacks authority to establish rules applicable to intrastate interLATA services); BellSouth at 15; USTA at 7; DOJ Reply at 5-6; AT&T at 8 n.7; MCI at 3; Excel at 11; CompTel at 5-6; TRA at 5-6; ITAA at 5-7.

[57] New York Commission at 2-4 (maintaining, however, that the Commission lacks authority to establish rules applicable to intrastate interLATA services); BellSouth at 15; USTA at 7; AT&T at 8 n.7; DOJ Reply at 5-6; MCI at 3; Excel at 11; CompTel at 5-6; TRA at 5-6; ITAA at 5-7.

[58] DOJ Reply at 7; MCI at 5; MCI Reply at 3-4; Excel at 11; ITAA at 5-6; CompTel at 5-6.

[59] AT&T at 8-9; Sprint Reply at 5; MCI at 5; TRA at 6-7; see also DOJ Reply at 6-7.

27. State representatives and some of the BOCs, however, challenge our tentative conclusion that sections 271 and 272 give the Commission authority over intrastate interLATA services.[60] These parties argue that sections 2(b) and 601(c) of the Act bar the Commission from exercising authority under sections 271 and 272 to establish rules applicable to intrastate services.[61] Although the New York Commission agrees with our tentative view that the term "interLATA" covers both intrastate and interstate services,[62] other parties objecting to our reading of the scope of sections 271 and 272 generally do not address the issue of whether the term "interLATA services" as used in the Act or the MFJ includes intrastate interLATA services. Instead, they appear to contend that, even if the term "interLATA services" includes both intrastate and interstate services, section 2(b) precludes the Commission from establishing rules applicable to intrastate interLATA services.[63] According to these parties, states have authority to establish rules to govern the BOCs' provision of intrastate interLATA services,[64] and it is premature for the Commission at this time to preempt states from exercising that authority.[65] NARUC and the Missouri Commission claim that the legislative history shows that Congress intended to limit the Commission's authority under sections 271 and 272 to interstate services. In support of this claim, these parties point to the fact that the House and Senate versions of the pre-conference bill exempted sections 271 and 272 from section 2(b), but those exemptions were removed in the final legislation.[66]

28. Parties opposing our tentative conclusions also argue that, although the MFJ restrictions on the BOCs applied to both interstate and intrastate interLATA services, the states retained authority to regulate a BOC's intrastate interLATA services when such services were authorized by the MFJ Court.[67] They assert, therefore, that, even if sections 271 and 272 apply to intrastate services, those provisions would not divest the states of authority over intrastate

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60 Bell Atlantic at 3; BellSouth at 15-17; California Commission at 2-9; Missouri Commission at 3; New York Commission at 2-6; Ohio Commission at 2-5; Wisconsin Commission Reply at 3-11; NARUC at 4-7.

61 Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 3; New York Commission at 3-5; Ohio Commission at 2; Wisconsin Commission Reply at 3; NARUC at 7.

62 New York Commission at 2-3.

63 Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2; NARUC at 7; see Wisconsin Commission Reply at 2, 6-8.

64 BellSouth at 15-17; California Commission at 5-6, 9; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2-5; Wisconsin Commission Reply at 3-5, 6-11; NARUC at 5-7.

65 New York Commission at 5-6; Wisconsin Commission Reply at 5-6; NARUC at 4-5.

66 NARUC at 7; Missouri Commission at 3; see also Bell Atlantic at 3.

67 California Commission at 3-4; Missouri Commission at 2; New York Commission at 3-4; NARUC at 6.

services,[68] and that the Commission's authority, if it exists, under sections 271 and 272, is not plenary.[69]

29. None of the parties opposing our reading of the scope of sections 271 and 272 contends that the Commission's authority under section 271(d) to authorize BOC entry into in-region interLATA services does not extend to BOC provision of intrastate interLATA services. The Wisconsin Commission argues, however, that "a state might decide that, for intrastate interLATA purposes, BOC (or affiliate) entry into intrastate interLATA markets should be delayed subject to satisfaction of previously-made infrastructure investment commitments, needed quality of service improvements, universal service obligations, or some other factor for which delayed or conditioned entry into intrastate interLATA markets is appropriate leverage exercised in the public interest."[70]

3. Discussion

30. For the reasons set forth below, we conclude that sections 271 and 272, and the Commission's authority thereunder, apply to intrastate as well as interstate interLATA services provided by the BOCs or their affiliates. We base this conclusion on the scope of the pre-1996 Act MFJ restrictions on the BOCs' provision of interLATA services, as well as on the plain language of sections 271 and 272, and the requirements of those sections. In addition, we find that section 2(b) does not bar the Commission from establishing regulations to clarify and implement the requirements of section 272 that apply to intrastate interLATA services and other intrastate matters that are within the scope of section 272. We hold, therefore, that the rules we establish to implement section 272 are binding on the states, and the states may not impose regulations with respect to BOC provision of intrastate interLATA service that are inconsistent with section 272 and the Commission's rules under section 272. We emphasize, however, that the scope of the Commission's authority under sections 271 and 272 extends only to matters covered by those sections. Those sections do not alter the jurisdictional division of authority with respect to matters falling outside their scope. For example, rates charged to end users for intrastate interLATA service have traditionally been subject to state authority, and will continue to be.

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68 California Commission at 3; Missouri Commission at 2; New York Commission at 3; Ohio Commission at 2; Wisconsin Commission Reply at 4; NARUC at 5-7.

69 BellSouth at 15; PacTel at 3. BellSouth and PacTel argue that Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services. BellSouth at 15; PacTel at 3.

70 Wisconsin Commission Reply at 7.

31. We stated in the Notice, and several parties agree, that section 601(a) of the 1996 Act indicates that Congress intended the provisions of the Act to supplant the MFJ.[71] That section provides:

> Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the [MFJ] shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by [the MFJ].[72]

No party challenges the fact that the MFJ generally prohibited the BOCs and their affiliates from providing any interLATA services -- interstate or intrastate.[73] Moreover, no party challenges the fact that the term "interLATA services" as used in the MFJ referred to both intrastate and interstate services.[74]

32. Similarly, with respect to the term "interLATA services" as used in sections 271 and 272, the DOJ, AT&T, and BellSouth maintain that, because the Act defines the term "interLATA" to include intrastate services, references in sections 271 and 272 to interLATA services apply to both intrastate and interstate services. We agree.

33. The Act defines "interLATA service" as "telecommunications between a point in a local access and transport area and a point located outside such area."[75] The Act further defines the term "LATA" as "a contiguous geographic area . . . established before the date of enactment of the [1996 Act] by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the [MFJ]" or subsequently modified with approval of the

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[71] Notice at ¶ 21; DOJ Reply at 5-6; New York Commission at 2-4 (maintaining, however, that the Commission lacks authority to establish rules applicable to intrastate interLATA services); Missouri Commission at 2 (but arguing that states still retain jurisdiction, as they did under the MFJ); BellSouth at 15-16 (stating that "the FCC unquestionably has authority to entertain and act upon Section 271 applications for BOC interLATA entry, whether interstate or intrastate;" but asserting that "Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services"); AT&T at 8 n.7; Excel at 11; CompTel at 5-6; TRA at 5-6; ITAA Comments at 5.

[72] 1996 Act, § 601(a), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

[73] See United States v. Western Electric Co., 552 F. Supp. 131, 227 (D.D.C. 1982) (subsequent history omitted).

[74] See id., 552 F. Supp. at 229 (defining "exchange area" and "interexchange telecommunications"); United States v. Western Electric Co., 569 F. Supp. 990, 993 (D.D.C. 1983) (explaining that the term "local access and transport area" was being used as a replacement for "exchange area") (subsequent history omitted).

[75] 47 U.S.C. § 153(21).

Commission.[76] This definition expressly recognizes that a LATA may comprise an area, such as a metropolitan statistical area, that is smaller than a state.[77] Indeed, the DOJ notes that most LATAs established by the MFJ consist of only parts of individual states; only nine LATAs out of a total of 158 encompass an entire state.[78] Thus, by defining an interLATA service as telecommunications from a point inside a LATA to a point outside a LATA, the Act expressly recognizes that interLATA services may include telecommunications between two LATAs within a single state. Accordingly, we find that the term "interLATA services," as used in sections 271 and 272, expressly refers to both intrastate and interstate services.

34. Although the term "interLATA services" as used in the MFJ and in sections 271 and 272 refers to both interstate and intrastate interLATA services, the New York Commission and others assert that, when Congress transferred responsibility for enforcing the prohibition on the BOCs' provision of interLATA services from the U.S. District Court to the Commission, it intended to limit our authority only to interstate interLATA services.[79] To the contrary, we find that reading sections 271 and 272 as granting the Commission authority over intrastate as well as interstate interLATA services is consistent with, and indeed necessary to effectuate, Congress's intent that sections 271 and 272 replace the restrictions of the MFJ with respect to BOC provision of interLATA services.

35. The jurisdictional limitation that the New York Commission and others seek to read into sections 271 and 272 would lead to implausible results. Specifically, under that statutory interpretation, the BOCs would have been permitted to provide in-region, intrastate, interLATA services upon enactment, without complying with the section 271 entry requirements or the section 272 safeguards, and subject only to any existing, generally applicable state rules on interexchange entry. Any such rules, presumably, would not have been specifically directed at BOC entry, because of the long-standing MFJ prohibition on entry. Because concerns about BOC control of bottleneck facilities needed for the provision of in-region interLATA services are applicable to both interstate and intrastate services, it seems clear that sections 271 and 272 apply equally to the BOCs' provision of both intrastate and interstate, in-region, interLATA services. We find no reasonable basis for concluding that Congress intended to lift the MFJ's ban on BOC provision of intrastate interLATA services, which constitute approximately 30 percent of interLATA traffic, and permit the BOCs to offer such services before satisfying the requirements

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[76] 47 U.S.C. § 153(25). As the court stated, "simply put, [a Standard Metropolitan Statistical Area] is a U.S. Department of Commerce designation that includes a city and its suburbs. United States v. Western Electric Co., 569 F.Supp. at 993, n.8.

[77] States served by a BOC with only one LATA are: Delaware, Maine, New Hampshire, New Mexico, Rhode Island, South Dakota, Utah, Vermont, and Wyoming. The District of Columbia is covered entirely by one LATA that also covers portions of southern Maryland and northern Virginia. DOJ Reply at 6 n.4.

[78] DOJ Reply at 6.

[79] See Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2; Wisconsin Commission Reply at 3-4; NARUC at 5-7.

of sections 271 and 272.[80] As the DOJ notes, "Congress could not have intended, for example, to open up the intrastate interLATA market immediately for BOC entry, without the carefully-devised entry requirements of Section 271, while at the same time establishing those requirements with respect to interstate interLATA entry. Nor could Congress have meant to defeat the safeguards carefully imposed under Section 272 by permitting the BOCs to engage in the behavior which Section 272 prohibits, as long as they do it within the individual states."[81] Indeed, we find it significant that neither the states nor the BOCs have argued that such a result was intended. In light of this analysis, we find that the Commission's authority under sections 271 and 272 extends to both intrastate and interstate interLATA services.

36. Similarly, several parties support the conclusion that our authority to consider the applications of BOCs seeking to provide in-region interLATA service pursuant to section 271(d) applies to both interstate and intrastate services.[82] None of the state representatives and BOCs commenting on this issue claims that the Commission's authority under section 271(d) does not apply to a BOC's provision of intrastate interLATA services. Despite the lack of controversy on this point, several commenters claim that rules adopted under section 272 apply only to interstate services.[83] We believe that the requirements of sections 271 and 272 repudiate this argument. In granting an application under section 271(d), the Commission must determine, among other things, that the BOC meets the requirements of section 271(d)(3)(B). Under this provision, the Commission must find that the requested authorization "will be carried out in accordance with the requirements of section 272."[84] In light of the Commission's authority to approve entry into both intrastate and interstate in-region interLATA service, pursuant to section 271, it seems logical and necessary that the Commission's authority to impose safeguards established by section 272, should similarly extend to both intrastate and interstate interLATA service.

37. Several parties have argued that, although the MFJ restrictions on the BOCs applied to both interstate and intrastate interLATA services, the states retained authority to regulate a BOC's intrastate interLATA services when such services were authorized by the MFJ court. They assert, therefore, that, even if sections 271 and 272 apply to intrastate services, those

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[80] See Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Table 6 (Com. Car. Bur. Feb. 1996).

[81] DOJ Reply at 7.

[82] DOJ Reply at 4-7; New York Commission at 2 (maintaining, however, that the Commission lacks authority to establish rules regarding intrastate services); AT&T at 8; AT&T Reply at 3-5; MCI at 3; MCI Reply at 3-4; Sprint at 9-10; Sprint Reply at 4; USTA at 7 (but arguing that section 272 is self-implementing); Excel at 11; CompTel at 3-4; TRA at 5-6; ITAA at 5-7; BellSouth at 15 (maintaining, however, that Congress did not intend to give the Commission plenary jurisdiction over intrastate interLATA services); PacTel at 3.

[83] Bell Atlantic at 3; BellSouth at 15-16; California Commission at 2-3; Missouri Commission at 2-3; New York Commission at 2-5; Ohio Commission at 2; NARUC at 7; see Wisconsin Commission Reply at 2, 6-8.

[84] 47 U.S.C. §271(d)(3).

provisions would not divest the states of authority over intrastate services. As we stated at the outset of this discussion, the scope of the Commission's authority under sections 271 and 272 extends only to matters covered by those sections, i.e., authorization for BOC entry into in-region interLATA service and the safeguards imposed in section 272. We do not dispute that the states retain their authority to regulate intrastate services in other contexts.

38. We further find that the requirements of sections 271 and 272 buttress our conclusions regarding the scope of the Commission's jurisdiction. For example, we find it significant that section 271(h) directs the Commission to address intrastate matters relating to BOC provision of incidental interLATA services. That section states that "[t]he Commission shall ensure that the provision of [incidental interLATA services] by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."[85] Telephone exchange service is primarily an intrastate service. This reference to a plainly intrastate service indicates that the scope of section 271 encompasses intrastate matters, and thus the Commission's authority thereunder applies to both intrastate and interstate interLATA services.

39. State representatives and some BOCs argue that sections 2(b) and 601(c) of the Act preserve the states' authority to adopt rules regarding BOC provision of intrastate interLATA services. They argue that section 2(b) bars the Commission from exercising authority under sections 271 and 272 to establish rules applicable to intrastate interLATA services.[86] For the reasons set forth below, we find that section 2(b) does not preclude us from finding that sections 271 and 272, and our authority to promulgate rules thereunder, apply to BOC provision of intrastate interLATA services.

40. In Louisiana Public Service Commission v. Federal Communications Commission, the Supreme Court determined that, in order to overcome section 2(b)'s limits on the Commission's jurisdiction with respect to intrastate communications service, Congress must either modify section 2(b) or grant the Commission additional authority.[87] As explained above, we find that the term "interLATA services," by the Act's own definition, includes intrastate services, and that Congress, in sections 271 and 272, expressly granted the Commission authority over intrastate interLATA services for purposes of those sections. Accordingly, consistent with the

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[85] Id. § 271(h) (emphasis added).

[86] As noted above, with the exception of the New York Commission, the parties challenging the Commission's authority to preempt state regulation do not address the issue of whether the term "interLATA services" should be interpreted -- by definition or otherwise -- to include both intrastate as well as interstate services.

[87] Louisiana Public Service Comm'n v. Fed. Communications Comm'n, 476 U.S. 355, 377 (1986). Section 2(b) provides that, except as provided in certain enumerated sections [not including sections 271 and 272], "nothing in [the Communications Act] shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier." 47 U.S.C. § 152(b).

Court's statement in Louisiana, we find that section 2(b) does not limit our authority over intrastate interLATA services under sections 271 and 272.

41. In addition, we find that, in enacting sections 271 and 272 after section 2(b), and squarely addressing therein the issues before us, Congress intended for sections 271 and 272 to take precedence over any contrary implications based on section 2(b).[88] In construing these provisions, we are mindful that "it is a commonplace of statutory construction that the specific governs the general."[89] Moreover, where amended and original sections of a statute cannot be harmonized, the new provisions should be construed to prevail as the latest declaration of legislative will.[90] We find also that, in enacting the 1996 Act, there are other instances where Congress indisputably gave the Commission intrastate jurisdiction without amending section 2(b). For instance, section 251(e)(1) provides that "[t]he Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States."[91] Section 253 directs the Commission to preempt state regulations that prohibit the ability to provide intrastate services. Section 276(b) directs the Commission to "establish a per call compensation plan to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call."[92] Section 276(c) provides that, "[t]o the extent that any State [payphone] requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."[93] None of these provisions is specifically excepted from section 2(b), yet *all* of them explicitly give the Commission jurisdiction over intrastate matters. Thus, we find that the lack of an explicit exception in section 2(b) does not require us to conclude that the Commission's jurisdiction under sections 271 and 272 is limited to interstate services. A contrary holding would nullify several explicit grants of authority to the Commission, noted above, and would render substantial parts of the statute meaningless. Thus, in this instance, we believe that the lack of an explicit exception in section 2(b) is not dispositive of the scope of the Commission's jurisdiction.

42. Moreover, as stated above, with the exception of the New York Commission, the parties challenging the Commission's authority to preempt state regulation under sections 272 do not address the issue of whether "interLATA services" are defined by the Act to include intrastate services. The New York Commission agrees with us that it does. These parties (including the New York Commission) also do not challenge the proposition that Congress vested in the

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88 See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

89 Morales v. Trans World Airlines, Inc., 504 U.S. at 384.

90 2 J. Sutherland, Statutory Construction § 22.34 (6th ed.); see also American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196, 200 (2nd Cir. 1974).

91 47 U.S.C. § 251(e)(1).

92 Id. § 276(b).

93 Id. § 276(c).

Commission authority over BOC entry into all in-region interLATA services -- intrastate and interstate. We find it difficult to reconcile these parties' silence on these issues, as well as the New York Commission's agreement that "interLATA services" includes intrastate services, with their position that section 2(b) limits the application of the Commission's implementing rules under section 272 to interstate interLATA services. If, as it remains undisputed in the record, the Commission would necessarily determine, in assessing whether to allow BOC entry into in-region interLATA services, whether a BOC's provision of intrastate as well as interstate interLATA services complies with section 272, we can find no basis to maintain that the Commission's authority under sections 271 and 272 does not include authority to apply its interpretation of section 272 to all of the interLATA services -- intrastate and interstate -- at issue in the BOC's 271 in-region interLATA services application.

43. NARUC and the Missouri Commission stress that earlier drafts of the legislation would have amended section 2(b) to make an exception for certain sections of Title II, including sections 271 and 272, but the enacted version did not include that exception. They argue that this change demonstrates that Congress intended that section 2(b)'s limitations remain fully in force with regard to sections 271 and 272. We find this argument unpersuasive.

44. As noted above, parties that attach significance to the omission of the proposed amendment of section 2(b) rely on a rule of statutory construction providing that, when a provision in a prior draft is altered in the final legislation, Congress intended a change from the prior version. This rule of statutory construction has been rejected, however, when changes from one draft to another are not explained.[94] In this instance, the only statement from Congress regarding the meaning of the omission of the section 2(b) amendment appears in the Joint Explanatory Statement. According to the Joint Explanatory Statement, all differences between the Senate Bill, the House Amendment, and the substitute reached in conference are noted therein "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes."[95] Because the Joint Explanatory Statement did not address the removal of the section 2(b) amendment from the final bill, the logical inference is that Congress regarded the change as an inconsequential modification rather than a significant alteration. It seems implausible that, by enacting the final version, Congress intended a radical alteration of the Commission's authority under sections 271 and 272, given the total lack of legislative history to that effect. Based on the foregoing, we conclude that elimination of the proposed amendment of section 2(b) was a nonsubstantive change.

45. Moreover, even if it were appropriate to speculate as to the meaning of the omission of the section 2(b) exception, we disagree with the argument that the omission necessarily indicates that Congress intended not to provide the Commission authority over

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[94] Mead Corp v. Tilley, 490 U.S. at 723; Rastelli v. Warden, 782 F.2d at 23; Drummond Coal v. Watt, 735 F.2d at 474.

[95] Joint Explanatory Statement at 113.

intrastate services in sections 271 and 272. We find it is equally possible that Congress omitted the exception based on an understanding that the use of the term interLATA in sections 271 and 272 established a clear grant of authority over intrastate services and therefore that such an exception was unnecessary.

46. We similarly are not persuaded that section 601(c) of the 1996 Act evinces an intent by Congress to preserve states' authority over intrastate matters. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[96] As explained above, we conclude that sections 271 and 272, which apply to interLATA services, were expressly intended to modify federal and state law and jurisdictional authority.

47. For all of the reasons discussed above, we conclude that sections 271 and 272, and the Commission's authority thereunder, apply to intrastate and interstate interLATA services provided by the BOCs or their affiliates. We hold, therefore, that the rules we establish to implement section 272 are binding on the states, and the states may not impose, with respect to BOC provision of intrastate interLATA service, requirements inconsistent with sections 271 and 272 and the Commission's rules under those provisions. In this regard, based on what we find is clear congressional intent that the Commission is authorized to make determinations regarding BOC entry into interLATA services, we reject the suggestion by the Wisconsin Commission that, after the Commission has granted a BOC application for authority under section 271, a state nonetheless may condition or delay BOC entry into intrastate interLATA services.[97]

C. Scope of Commission's Authority Regarding Manufacturing Services

48. In the Notice, we tentatively concluded that the Commission's authority under section 272 extends to all BOC manufacturing of telecommunications equipment and CPE. Only two parties, Sprint and TIA, commented on this issue, and both agreed with our tentative conclusion.

49. We adopt our tentative conclusion that our authority under section 272 extends to all BOC manufacturing of telecommunications equipment and CPE. As we stated in the Notice, to the extent that sections 271 and 272 address BOC manufacturing activities, we believe that the same statutory analysis set forth above with respect to interLATA services would apply. We see no basis for distinguishing among the various subsections of sections 271 and 272. Even apart from that analysis, however, we believe that the provisions concerning manufacturing clearly apply to all manufacturing activities. Section 2(b) of the Communications Act limits the

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[96] 1996 Act, § 601(c)(1), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

[97] We note that a state would retain authority to enforce obligations relating to a BOC's provision of intrastate interLATA service, such as those identified by the Wisconsin Commission, through mechanisms other than denial or delayed of entry into the intrastate interLATA market.